IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1655

ROBERT RICKENBACKER,

Petitioner,

against

THE WARDEN, Auburn Correctional Facility, and THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 550 F. 2d 62. The opinion of the District Court has not been reported to date. Copies of the opinions are annexed to the petition.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

Question Presented

Did the Court of Appeals for the Second Circuit correctly hold that petitioner was adequately represented by counsel at his state court trial where his attorney, an experienced criminal lawyer, was active in petitioner's behalf throughout the trial and focused the jury's attention on petitioner's defense, i.e., the unreliability of the eyewitnesses' identification?

Facts

Petitioner, Robert Rickenbacker, is presently confined in Auburn Correctional Facility, Auburn, New York. He is serving a sentence of 25 years to life imprisonment imposed upon him in Supreme Court, Kings County on January 20, 1972, following his conviction, after a jury trial, of the crime of murder.

The judgment of conviction was unanimously affirmed without opinion by the Appellate Division, Second Department (*People* v. *Rickenbacker,* 46 A D 2d 740 [2d Dept. 1974]) and leave to appeal to the New York Court of Appeals was denied on November 14, 1974 (STEVENS, J.).

Petitioner and three other men were charged with felony murder and common law murder following a robbery during which one of the victims was shot and killed. Petitioner's three accomplices, Zachary Morgan, David Ferguson and Curtis Austin, were apprehended as they attempted to flee from the scene of the crime. Petitioner was arrested approximately nine months later.

The four men were tried together in May, 1971 in Supreme Court, Kings County (BARSHAY, J.). During trial Austin pleaded guilty to a lesser charge after admitting outside the hearing of the jury that he had waited in his car while his co-defendants went to commit the robbery

which led to the charges against them (FT 736, 740).* At the conclusion of the trial Morgan and Ferguson were convicted of murder. A mistrial was declared as to petitioner when the jury could not reach a verdict.

Petitioner's second trial took place in October, 1971. Sam Fichera, the owner of the grocery store which was robbed, testified that at about 6:30 p.m. on July 30, 1970, three men entered the store. He saw the faces of two of them, later identified as Morgan and Ferguson (44). While Morgan held a gun, Ferguson emptied the cash register. Also standing near the register at that point was Vito Petrancosta, Fichera's cousin. Apparently Petrancosta moved and this prompted Morgan to shoot him (45). The robbers ran from the store followed by Fichera who had seized a gun which he kept in the store. He fired two shots —one into the air and one at the two men he saw running down the street (47).

Michael Petrancosta, the son of the deceased, was also in the store when his father was shot. He too saw three men in the store. He later recognized only Morgan and testified that it was Morgan who shot his father (49-51).

Patrolman Thomas Walsh testified that on July 30, 1970, at about 6:30 p.m. he was on radio car patrol on East 29th Street, Brooklyn near Albermarle Road when he heard pistol shots. He walked toward Albemarle Road and saw three young black men running toward a parked car occupied by one black youth. He was approximately 20 or 30 feet from the vehicle. Two of the men who were running—Zachary Morgan and petitioner—were carrying guns. The third man was David Ferguson (55-57). As they approached the car, they faced him and he saw their faces as well as their entire bodies (58). Morgan entered

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* Numbers in parentheses preceded by the letters "FT" refer refer to the pages of the transcript of petitioner's first trial. Unless otherwise indicated, all other numbers in parentheses refer to the pages of the transcript of the second trial.

the car but Ferguson and petitioner turned and ran back to Albemarle Road. Patrolman Walsh saw petitioner—who was then 30 or 40 feet away—throw a gun between two parked cars (59). He then entered his patrol car and drove in pursuit of the two men. At one point he drove up parallel to them and again saw petitioner's face, but traffic prevented him from catching them (60). Petitioner looked back one more time before he and Ferguson ran into an A & P (61-62). Patrolman Walsh left his car and followed them through the market where he was able to see petitioner's face another time (62). Ferguson and petitioner ran through the store and into a parking lot, where they separated. Patrolman Walsh pursued Ferguson and apprehended him, but petitioner escaped. Patrolman Walsh acknowledged that it was necessary for him to turn several corners while pursuing the two men and also that they were running fast. He estimated that the entire chase took approximately three or four minutes (65-66).

Patrolman Donald Scannapieco, a partner of Patrolman Walsh, testified that he also heard shots and saw the three men running. He was able to see their faces since they were running in his direction (67-70). Two of them—Morgan and petitioner—were carrying guns. They attempted to enter a parked car but only Morgan succeeded in getting in. The other two, petitioner and Ferguson, turned toward him and then turned and ran the other way. At the time they turned toward him they were approximately 20 feet away and he could see their faces (72). While Patrolman Walsh chased the two men, he arrested Morgan and the man seated in the car (72).

Detective Robert Marshall testified that he was in charge of investigating the robbery and shooting which took place on July 30, 1970 (75). He spoke to the three men who had been arrested. At midnight of that date he proceeded to 63 Decatur Street in Brooklyn where he spoke to a man (78). Inside the premises, which was a rooming house,

he conducted a room-to-room search but did not find petitioner (79). Based on information he received he went to several other locations and spoke to people at each place but did not find petitioner. During the next month he continued going to other locations. In addition, on approximately one dozen occasions he kept 63 Decatur Street under surveillance, mostly between 8:00 p.m. and midnight until 6:00 or 7:00 a.m. (116-117). He saw petitioner for the first time on March 11, 1971 at the police station. In taking his pedigree, he asked petitioner his name and address and was told, Robert Rickenbacker, 63 Decatur Street (86).

At the conclusion of Marshall's testimony, defense counsel moved to strike out the parts of the testimony relating to the efforts to find petitioner on the ground that no foundation had been laid for it and, therefore, it could not be relied upon to show flight (88, 91-92). Counsel also moved to strike the statement relating to the taking of petitioner's pedigree on the ground that no Miranda warnings had been given (89). Both requests were denied.

After testimony by the medical examiner the People rested. The defense presented no witnesses.

In summing up to the jury, defense counsel pointed out that neither of the witnesses who were present in the store was able to identify petitioner (162, 167). He then attempted to undermine the testimony of the police officers who stated they had seen petitioner running from the scene by suggesting that the men were running fast at the time, that Patrolman Walsh lost sight of petitioner several times because the chase went around several corners and that the entire chase lasted only three or four minutes (163-165). He also noted that the prosecution had not introduced any fingerprint evidence with respect to the gun which petitioner had discarded (168).

The summation by the Assistant District Attorney emphasized the fact that two policemen had seen petitioner

run from the scene of the crime together with two men (176-177), later identified by the victims as having committed the crime. He also argued that for a period of nine months police efforts to find petitioner were unsuccessful and that this indicated flight (179).

During its deliberations the jury asked to have the reporter read the testimony of the store owner and the son of the deceased as well as that of the two officers who saw petitioner running from the scene of the crime. After this was done the jury continued its deliberations and returned a guilty verdict.

The District Court Opinion

In his application for federal habeas corpus relief, petitioner attacked his conviction on several grounds including, *inter alia,* a claim that he was inadequately represented at trial by his assigned attorney. The application was denied on February 24, 1976.*

In rejecting petitioner's contention that his trial attorney had inadequately represented him the District Court concluded that petitioner's attorney

> "did not fail to 'present the cause of the accused', or, perform so 'ineptly as to give rise to a valid claim of inadequate assistance under the strict standard laid down in *United States* v. *Wright,* [176 F. 2d 376 (2d Cir. 1949)]."

The Court examined each of counsel's alleged omissions and found that petitioner "simply differ[ed] with defense counsel's strategy" (23a).* This difference of opinion did not entitle petitioner to relief.

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* Since petitioner subsequently abandoned all of the claims considered by the District Court except the one relating to the adequacy of his trial lawyer's representation, respondents' discussion of the District Court opinion is confined to that issue.

* Numbers in parentheses followed by the letter "a" refer to pages of the Appendix to the petition.

In particular, the Court held that the question of how extensively the witnesses should have been cross-examined was a judgment to be made by counsel.

> "As has been pointed out many times before, the advisability of extensive cross-examination is a matter open to honest differences of opinion." (23a-24a).

In the instant case counsel was able to make his judgment after reviewing the witnesses' testimony at the first trial (23a). The Court held that, in any event, even if more questions might have been asked, petitioner was not harmed since counsel's summation to the jury emphasized "the inherent unreliability of eye-witness identifications" (24a).

The Court also rejected petitioner's contention that counsel improperly failed to object to the introduction in evidence of the gun discarded by appellant as he fled. In light of the police officer's testimony that he saw petitioner discard the gun and retrieved it minutes after petitioner escaped, "experienced counsel may well have determined that an objection would have been futile" (24a).

Finally the Court held insignificant counsel's failure to object to so much of the district attorney's opening statement as promised to introduce the testimony of petitioner's relatives and friends on the issue of flight. The Court pointed out that counsel had gone one step further and moved to strike the entire testimony of the police officer who testified that petitioner could not be found for nine months after the crime.

Based on its review of the record, which included a statement at the conclusion of the trial by the trial judge commending both the prosecution and defense attorneys, the Court concluded that "(t)his case is a long way from approaching the standard for ineffective assistance of

counsel" applied by the decisions in the Second Circuit (25a).

The Opinion of the Court of Appeals

On December 22, 1976, the Court of Appeals for the Second Circuit affirmed the decision of the District Court, Judge Oakes dissenting. In the view of the majority, "the performance of Rickenbacker's counsel did not fail to meet any of the suggested standards [applied by other courts], all of which involve the heavy burden of establishing incompetence." 550 F. 2d at 66. Therefore the majority declined petitioner's invitation to reconsider the standard utilized by the Second Circuit for evaluating the competence of counsel, holding that it was not necessary to decide the question in the context of this case.

The majority dismissed without discussion three of the alleged errors urged by petitioner as evidence that his counsel was incompetent, i.e., that he failed to make an opening statement, that he failed to object to the introduction of the gun and that he failed to object to certain parts of the charge to the jury. The Court then considered the remaining allegations in support of the claim.

With respect to the allegation of inadequate cross-examination, the majority concluded that although there were "apparent weaknesses in [counsel's] performance" he "may reasonably have concluded that more extensive cross-examination would strengthen rather than weaken the state's case." The Court noted that, in making this determination, counsel had the benefit of access to the transcript of the first trial.

Insofar as petitioner challenged the quality of counsel's summation, the majority found that counsel, in fact, discussed "all the important points the jury should consider." 550 F. 2d at 66. And although counsel did not object to an improper remark by the prosecutor in summation, this did

not establish incompetence, particularly since counsel did object to other remarks.*

The majority noted that counsel attempted to keep out evidence suggesting that petitioner fled after the crime and counsel was successful in keeping out evidence as to petitioner's failure to report to his parole officer during the relevant period.

The majority concluded that petitioner was not entitled to relief simply because, as a matter of hindsight, his attorney might have done a better job and pointed out that both the trial judge and the District Judge had considered counsel's performance "satisfactory."

Judge Oakes, in his dissent, agreed that counsel's performance did not satisfy the "farce and mockery" standard employed by the Second Circuit, but differed with the majority as to whether counsel satisfied "the standard of reasonable competency." 550 F. 2d at 67. Therefore, he would have reconsidered the standard of the Second Circuit and, upon doing so, abandoned it.

As examples of "unreasonable incompetence", Judge Oakes pointed to the failure to object to admission of the gun—notwithstanding the fact that no such objection was made by any of the lawyers at petitioner's first trial; the failure to ask questions "regarding the weapon",—although respondents had emphasized that drawing attention to the unique characteristics of the gun might have reinforced rather than undermined Walsh's identification; the failure to "drive home" the fact that no one present in the store could identify petitioner—a point specifically made by counsel in summation; and the failure to question Walsh more closely about his opportunities for observation—another point argued by counsel in his summation.

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* Counsel's failure to make the objection in question was one of several allegations raised for the first time in the Circuit Court by petitioner's present attorney. The attorney who represented him on his direct appeal did not raise this point.

Reason for Denying Certiorari

The majority below correctly held that it was not necessary to decide in this case the question of what standard should be applied in evaluating claims of incompetent representation by counsel since the performance of petitioner's trial attorney satisfied any of the recognized standards.

Petitioner contends in this Court, as he did below, that the "farce and mockery of justice" standard used by the Second Circuit in evaluating the adequacy of representation by counsel is not a valid measure and should be replaced by some other standard. He cites various standards which have been adopted by other Circuit Courts but does not compare their relative merits. Apparently, in his view, any of the cited standards is preferable to the existing one. The short answer to petitioner's argument is that counsel's performance easily meets those less stringent standards as well, and the majority below correctly so held.

The flaw in petitioner's claim is that, in essence, he simply differs with the way the defense should have been conducted. However, as Circuit Judge Friendly aptly pointed out in *United States* v. *Katz*, 425 F. 2d 928, 931 (2d Cir. 1970), the fact that "the case could have been better tried" is not a reason to sustain such a claim and set aside an otherwise valid judgment of conviction.

Thus, this is not a case in which counsel failed to present an available substantial affirmative defense (*United States ex rel. Marcelin* v. *Mancusi*, 462 F. 2d 36 [2d Cir. 1972]) and, indeed, petitioner has never made such an allegation.*

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* Counsel for petitioner, in a display of hindsight, does refer for the first time to what he characterizes as "the sudden abandonment of the intent to present defense witnesses." Petitioner's Brief, p. 22, n. 10. However, there has never been any suggestion in this case, even at this late date, that petitioner actually had any defense to the charge. Certainly no defense was offered by the attorney who represented him at his first trial. Nor was the point raised on his direct appeal. Accordingly, this reference must be viewed as simply another example of petitioner's tendency to add new allegations of alleged incompetence at every stage of this proceeding, thereby illustrating the wisdom of the rule prohibiting evaluation of counsel's performance on the basis of hindsight.

(footnote continued on following page)

Nor is this a case in which counsel failed to prepare sufficiently. See *United States ex rel. Testamark* v. *Vincent*, 496 F. 2d 641 (2d Cir. 1974). An explicit allegation to this effect is made for the first time in this Court and rests upon petitioner's contention that counsel did not read the transcript of the first trial. Petitioner's Brief, p. 21. However, this undocumented assumption was not accepted by either the District Court or the Court below and is not supported by the record. On the contrary, the record shows that in his motion for a new *Wade* hearing trial counsel referred to specific testimony by Officer Walsh at the first trial (7, 9-10). Moreover, contrary to petitioner's theory at page 23 of his brief, counsel's attempt to dispute the *corpus delecti* indicates that he read the transcript since this was a defense urged by one of petitioner's co-defendants at the first trial.

Petitioner's challenge is therefore reduced to a number of alleged omissions of counsel which he maintains amounted to ineffective assistance. Respondents submit that the alleged errors upon which he relies do not constitute incompetence and, in any event, did not obviously prejudice appellant's rights. See *United States ex rel. Maselli* v. *Reincke*, 383 F. 2d 129, 133 n.4 (2d Cir. 1967); Stone, "Ineffective Assistance of Counsel and Post Conviction Relief in Criminal Cases: Changing Standard and

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(footnote continued from preceding page)

Practical Consequences," 7 Colum. Human Rts. L. Rev. 427, 447-448 [1975]).*

For example, petitioner maintains that counsel was delinquent because he did not closely cross-examine the prosecution witnesses, particularly the police officers who identified him at trial. Indeed, in the Court below, he posited a series of questions which counsel might have asked on cross-examination. As a practical matter, however, the question of what and how much to ask the witnesses was a judgment to be made by counsel based upon the facts known to him which, in this case, included access to the witnesses' testimony at petitioner's first trial, as well as at the *Wade* hearing which preceded it.

The transcript of the first trial discloses that the officers who identified petitioner as one of the men fleeing from the scene of the crime did not falter in their testimony to this effect despite extensive cross-examination by the attorneys representing the four defendants at the trial. Therefore, as the District Court and the majority below correctly pointed out, counsel could well have concluded that extensive cross-examination of these witnesses might simply reinforce their testimony on direct examination. See Finer, "Ineffective Assistance of Counsel", 58 Cornell L. Rev. 1077, 1097 (1973).

Petitioner also maintains that counsel should have cross-examined the two eye-witnesses, Fichera and Michael

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* Stone concludes after reviewing the current state of the law, that

> prejudice continues to be the crucial element in most successful attacks on a conviction. Regardless of the standard applied, the sympathy of the facts of each case will probably determine whether relief is forthcoming in most situations. Such a conclusion is logical in light of the inherent imprecision and subjectivity involved in measuring the effectiveness of counsel's performance. Thus, the differences among courts subscribing to different theoretical standards is not as substantial in practice as might be expected.

Petrancosta, more actively.* He concedes, however, that neither witness identified him as one of the men in the store. As with the police officers, he posited questions in the Court below which might have been asked. The fact that none of them would have been helpful is demonstrated by the testimony of the witnesses at the first trial. Indeed, petitioner's case would have been injured if, as he suggested below, counsel attempted to emphasize that only one of the robbers, Morgan, was armed since Fichera specifically testified at the first trial that he saw two guns in the store (FT 353, 356). Trial counsel, who had read the minutes of the first trial, properly refrained from asking how many guns Fichera saw because (a) the answer would have corroborated the officers' testimony that two men were carrying guns as they ran from the scene of the crime and (b) Fichera might have described the gun as he did at the first trial.**

Petitioner also challenged the quality of counsel's summation in the Court below, an attack which was undoubtedly prompted by the District Court's determination that even if the cross-examination might have been more extensive this "did not result in a failure to put before the jury the inherent unreliability of eye-witness identification." One has only to read the summation to see that petitioner's belated challenge is wholly without merit.

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* At petitioner's first trial, the attorney who represented him did not cross-examine either Fichera or Petrancosta (FT 409, 504A).

** At the first trial, both Fichera and officer Walsh were able to describe the gun as being large, silver in color and "old-fashioned" (FT 353, 532, 538). At the second trial the District Attorney neglected to elicit this testimony. If counsel had made an issue of how many guns Fichera saw, this might have prompted the District Attorney to fill the gap which he had left. Given the fact that the gun was introduced into evidence and seen by the jury it would have been far more damaging for the jury to hear that Fichera saw two guns in the store, one of which was an old, silver-colored gun which Walsh later saw in petitioner's hand as he fled from the scene of the crime.

Defense counsel devoted most of his summation to challenging the identification testimony against petitioner. Counsel first stressed the fact that the witnesses who had been present in the store at the time of the crime could not identify petitioner (162, 167). He then attacked the testimony of the two police officers who stated that they saw petitioner run from the scene of the crime with a gun in his hand. He pointed out that the entire chase was very brief, that because the men were running fast their faces must have been contorted (163-64), that Officer Walsh had ackknowledged that he lost sight of petitioner several times when he turned corners, that Officer Scannapieco just "got one look" (165), and that there was a lapse of time between the initial observation of petitioner and the in-court identification (164). Counsel also pointed out that there had been no proof that petitioner had been in the store or that petitioner had any distinguishing characteristic by which the officers might have identified him (167). Finally, counsel referred to the absence of any fingerprint evidence which would link petitioner to the gun (168).

The record thus demonstrates that counsel's summation "did discuss all the important points the jury should consider", as the majority below properly found. 550 F. 2d at 66. Contrast *United States* v. *Hammonds,* 425 F. 2d 527 (D. C. Cir. 1970), where defense counsel, in his summation, said absolutely nothing in behalf of his client. Apparently, the summation had an impact on the jury because during their deliberations they asked to hear the testimony of the two victims and the testimony of Officers Walsh and Scannapieco (238).

It is clear from the record as a whole that this is hardly a case in which "gross incompetence blotted out the essence of a substantial defense" (*Bruce* v. *United States,* 379 F. 2d 113 [D.C. Cir. 1967]). On the contrary, the record shows, and both the District Court and the majority

below found, that counsel did *not* fail to put before the jury the identification issue which was petitioner's "defense". Similarly, the record in this case satisfies the "customary level of skill and knowledge" standard. *Moore* v. *United States,* 432 F. 2d 730, 736 (3d Cir. 1970) (*in banc*). Although another lawyer might have used cross-examination rather than summation as a device for attacking the identification by the officers or emphasizing the victims' inability to identify petitioner, many reasonably competent criminal lawyers would concur in the approach adopted by petitioner's attorney. So long as his decisions are at least open to debate—as they obviously are, given the uniform affirmance of petitioner's conviction at each stage of review—counsel's performance may not be found constitutionally lacking. Finer, *supra* at 1080. Contrast *Moore* v. *United States, supra* (cross-examination failed to utilize impeachment information as to witness' earlier failure to identify the defendant).*

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* One commentator who advocates adoption of the *Moore* standard would not set aside the conviction in this case even if that standard had not been met since he has concluded that

> "to warrant [habeas corpus] relief such claims should have to demonstrate that counsel's ineffectiveness either subverted the fact-finding process or was so plain as to have required intercession of the trial judge."

Bines, "Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus", 59 Va. L. Rev. 927, 961-962 (1973). Plainly neither requirement is met in the instant case. On the one hand, there is no doubt that the verdict was reliable as evidenced by (a) the fact that the police knew the name of the fourth participant in the crime, (b) the fact that petitioner's co-defendant implicated petitioner when he pleaded guilty and (c) two trained police officers were able to identify him. On the other hand, not only did the trial judge see no reason to intercede, but on the contrary, it is clear from the record that he commended counsel's performance.

The trial record shows that experienced defense counsel was active in petitioner's behalf. In view of the fact that counsel's performance was constitutionally adequate under any of the standards proposed by petitioner, there is no call for any review by this Court.

CONCLUSION

For the foregoing reason the petition for a writ of certiorari should be denied.

Dated: New York, New York, July 13, 1977

Respectfully submitted,

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